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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 622 27

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC., AND MONTGOMERY WARD & CO., INCORPORATED,
Respondents.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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ARGUMENT.

A court has power to issue a writ of mandamus to revoke a reference of a non-jury case made in violation of rule 53(b). *McCullough* v. *Cosgrave*, 309 U. S. 634.

There is no conflict of opinion on this proposition.[1] The First Circuit held simply that "no exceptional circumstances" were present in *Narragansett Pier Amusement Co.* (1st Cir.), 224 F. 2d 231, which would "necessitate or render it appropriate" for that court to exercise the power in that case. That court did not question its power to issue the writ in an appropriate case.

Narragansett Pier Amusement Co. does not conflict with the case at bar. There is no similarity between the factual situations presented by the two cases. In *Narragansett*, eight jury cases were consolidated for trial of charges of fraudulent reporting of film rentals and antitrust violations involving four theaters over periods ranging from six to seventeen years. Understandably and properly, the trial court found that the issues were complicated—the prerequisite for reference of a jury case.[2]

In the case at bar, the Court of Appeals held that the situation presented by *Rohlfing* and *Shaffer* (non-jury cases in which, at the time they were referred, 87 plaintiffs sued 6 defendants in one case and 6 plaintiffs sued 7 defendants in the other) did not amount to a *showing* of an *exceptional* condition which *required* the references. In so holding, the Court of Appeals considered not only the showing stated in the orders of reference, namely:

> "* * * being confronted with an extremely congested calendar, and finding that exceptional conditions exist for this reason * * *"

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1. Even the dissenting judge conceded that the Court of Appeals had "jurisdiction and power to issue the writ". It is significant that the petitioner did not raise the question of power in the answer and briefs which he filed in the Court of Appeals prior to the publication of the *Narragansett* opinion.

2. The "Brief For Respondents In Opposition" in *Narragansett* observed that even if this Court had taken and reversed that case, "a direction to the First Circuit to accept and formally consider the petition for mandamus" would not have resulted in reversal of the trial court's order of reference since the record there clearly showed that the order "was fully justified."

but also all of the other reasons advanced in support of the references in the briefs filed in the Court of Appeals and now in the petition for certiorari.[3]

Obviously, there is no conflict between this case and *McCullough*. The showing relied on by the trial court as requiring the reference in *McCullough* was even more compelling than the reasons now advanced by the petitioner in the case at bar. 3 Fed. Rules Serv. 496. This Court must have regarded the showing in *McCullough* as inadequate. Otherwise, it would not have revoked the reference. If the showing in that case had satisfied the requirements of rule 53(b), this Court would not have ignored the merits of the case and revoked the reference, simply to chastise the District Court for having announced an unacceptable policy.

Since the showing in *McCullough* was not sufficient, it must follow that the showing in this case did not require the reference. Consistently, mandamus issued in both cases.

The petition for certiorari discusses a number of cases, dealing with various subjects, in an effort to conjure up conflicts which, it is suggested, would be resolved if this Court were to grant the petition. None of those cases involves rule 53(b).

The ruling below did not expound any new legal principles, nor will it have the consequences predicted by the petitioner. References will not cease in the Seventh Circuit, but they will "be the exception and not the rule." *Troyak* v. *Enos* (7th Cir.), 204 F. 2d 536, 544. Every trial judge in the federal system—and particularly in the Seventh Circuit—has had ample notice that rule 53(b) will

3. If a showing of a congested calendar were sufficient to satisfy the rule, then trial courts should be free to refer case after case until the congestion is relieved. No responsible source has ever advocated such a solution. *Report Adopted By Judicial Conference of the United States*, 13 F. R. D. 62; *Report of Committee on Practice and Procedure in the Trial of Antitrust Cases*, Antitrust Section, American Bar Association (1954).

be enforced. *Los Angeles Brush Corp.* v. *James*, 272 U. S. 701; *McCullough* v. *Cosgrave, supra*; *U. S.* v. *Kirkpatrick* (3rd Cir.), 186 F. 2d 393; *In re Irving-Austin Bldg. Corp.* (7th Cir.), 100 F. 2d 574, 577; *Adventures In Good Eating, Inc.* v. *Best Places To Eat, Inc.* (7th Cir.), 131 F. 2d 809, 814.

The Court of Appeals decided that there was no showing in this case of an exceptional condition which required the references—nothing more. The Court of Appeals had and exercised the power to mandamus to correct the violation of rule 53(h), for which there was no redress on appeal.[4]

The petition for certiorari is merely an attempt to have this Court substitute its judgment for that of the Court of Appeals on the question of whether the factual situation in this case warranted action to enforce the rule.

Conclusion.

The petition should be denied.

Respectfully submitted,

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4. As contrasted with the situations presented in *Bankers Life and Casualty Co.* v. *Holland*, 346 U. S. 379 and *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, where appeal was an adequate remedy.